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Clerk.

# Supreme Court of the United States

OCTOBER TERM, 1905.

No. [redacted]97

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ALABAMA AND VICKSBURG RAILWAY COMPANY AND ROBERT H. THOMPSON AND THOMAS A. McWILLIE, ITS SURETIES, PLAINTIFFS IN ERROR.

*v.*

THE RAILROAD COMMISSION OF THE STATE OF MISSISSIPPI.

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IN ERROR TO THE SUPREME COURT OF THE STATE OF MISSISSIPPI.

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***MOTION TO ADVANCE.***

# Supreme Court of the United States.

OCTOBER TERM, 1905.

ALABAMA & VICKSBURG RAILWAY COMPANY ET ALS., *Plaintiffs in Error*

*v.*

THE RAILROAD COMMISSION OF THE STATE OF MISSISSIPPI.

*No.* 371.

## IN ERROR TO THE SUPREME COURT OF THE STATE OF MISSISSIPPI.

### MOTION TO ADVANCE.

The defendant in error moves the Court to advance this cause for hearing and assigns the following reason for the motion.

The defendant in error, the Railroad Commission of Mississippi, is a governmental agency of that State which derives its power from its Annotated Code of 1892, defining the functions of said Commission in a series of sections extending from Sec. 4273 to Sec. 4336, both inclusive. Sec. 4297 provides that "the Commission shall docket, hear, and determine all complaints made of any time schedule, or of the tariff of rates, joint or several, made by any rail-

road, or fixed or approved by the Commission, on the ground that the same, in any respect, is, in the case of time schedule, unnecessarily inconvenient for the public or, in the case of a tariff of rates, that the charges are for more than just compensation, or that such charges, or any of them, amount to, or operate so as to effect unjust discrimination," etc. Application having been made to said Commission by the Board of Trade of Meridian, on December 13, 1902, in a petition praying that a certain proportionate rate of three and one-half cents per cwt., particularly described in the Record, then in effect from Vicksburg to Meridian over the line of appellant, be made an open rate subject to the use of all shippers from Vicksburg, and petition was granted and an order made converting the so-called rebilling rate into an open or flat rate, to the end that all dealers handling grain or grain products in car-load lots could enjoy the rate then in force from Vicksburg to Meridian. The validity of said order thus made by defendant-in-error has been confirmed by the Supreme Court of the State of Mississippi. The writ of error now pending herein, in superseding the said judgment of said Supreme Court of Mississippi, is suspending the execution of the said order made by the defendant-in-error as aforesaid, to the great detriment and inconvenience of the government of the State of Mississippi and the people thereof.

Wherefore, the defendant-in-error moves the Court that this cause may be advanced and that as early an argument of the same may be had as is convenient to this Court.

MONROE McCLURG,
HANNIS TAYLOR,
*Counsel for Defendant in Error.*

This April 2d, 1906.

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# Supreme Court of the United States,

## OCTOBER TERM, 1906.

*No 97.*

Office Supreme Court, U. S.
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JAMES H. McKENNEY,
Clerk.

ALABAMA AND VICKSBURG RAILWAY COMPANY,

*Plaintiffs in Error.*

vs

THE RAILROAD COMMISSION OF THE STATE OF MISSISSIPPI.

*Defendant in Error.*

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In Error to the Supreme Court of the State of Mississippi.

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MONROE McCLURG,
C. H. ALEXANDER,
HANNIS TAYLOR,

*Counsel for Defendant in Error.*

# Supreme Court of the United States.

OCTOBER TERM, 1906.

ALABAMA & VICKSBURG RAILWAY COMPANY, *Plaintiff in Error*,

*v.*

THE RAILROAD COMMISSION OF THE STATE OF MISSISSIPPI, *Defendant in Error.*

*No.* 97.

**In error to the Supreme Court of the State of Mississippi.**

## BRIEF FOR THE DEFENDANT IN ERROR.

I.

**Power of a State to control commerce wholly within its limits.**

We know that this court will not, in any event, attempt to reverse the judgment rendered by the Supreme Court of Mississippi in this case until it has (1) carefully considered the precise data of fact upon which such judgment was based, and (2) the conclusions of law drawn from such data. The opinion of the lower court begins with the statement that "the facts which are decisive of this controversy are very few and a statement of them eliminates

from consideration many of the more difficult questions urged by counsel." After declining to pass upon the Federal questions presented by counsel because neither is necessarily involved in the decision of this case, the lower court concludes as follows: "It might be conceded that the intrastate business of the railroad results in a net loss, and might further be conceded that the transporting and handling of grain and grain products at the rate established, may not in actual operation bring a fair remuneration when limited to that one commodity. *Nevertheless, the rate having been established by the voluntary action of the appellant, it must not be so enforced as to operate an unjust discrimination against any one. If the appellant chooses to establish as to a certain favored class of shippers, a rate so low as to be unremunerative, justice demands, and the law will require, that the rate be granted to all alike. 'Special privileges to none' is the rule of action by which common carriers must measure their conduct.*" Such is the essence of the judgment which determines that the commerce in question is "intrastate business" and as such wholly within the control of the State of Mississippi. It has been determined here that there is a commerce wholly within the State, which is not subject to the constitutional provision. Louisville, N. O. and T. R. Co. *v.* Mississippi, 133 U. S. 387; Lehigh Valley R. Co. *v.* Pennsylvania, 145 U. S. 192. The lower court reached the conclusion that the subject-matter in question was entirely within state control for the following reasons:

1. First, because plaintiff in error is a corporation created

by the State of Mississippi which, as it avers, is "engaged in the operation of a railroad for the transportation of passengers and freight between the cities of Vicksburg and Meridian in said State, a distance of one hundred and forty miles, *which constitutes the whole of its line.*"

2. Because the only complaint made by plaintiff is of an order made by the Railroad Commission of Mississippi, a governmental agency of that state which derives its powers from its Annotated Code of 1892, defining the functions of said commission. The lower court has adjudicated that the Railroad Commission in question acted strictly within its powers in this matter. Certainly that is purely a question of state law so far as the powers of the Commission under the state statutes are concerned.

3. Because the so-called "re-billing rate" devised by plaintiff with the view of making it appear that the business in question was interstate business was a dishonest device intended to conceal the real truth. The lower court says in its opinion: "That is the exact legal status of the order presented to us for review. A tariff or rate had been established by the voluntary action of the railroad company; that tariff operated to work unjust discrimination; complaint was made; the proof fully supports the justice and the truth of the grounds on which the complaint is based; that proof satisfied the Chancellor, and it satisfies us, that the so-called re-billing arrangement was simply a cloak assumed to conceal an arrangement which, while ostensibly granted as a concession to the Vicksburg dealers, was in truth, devised for the ulterior purpose of

fostering the interests of the Vicksburg, Shreveport and Pacific Railroad Co." The lower court had previously said "In the second place the freight reconsigned over the Alabama and Vicksburg Railway line did not complete one continuous trip, without handling or unloading, and was not necessarily, or even generally, the identical shipment which was originally consigned to the merchant in Vicksburg. The custom being that dealers in Vicksburg handling freight over the Vicksburg, Shreveport and Pacific Railroad Company could save their 'expense bills' (or receipts showing the amount of freight which they had received over that line) and be granted the privilege within ninety days from date of such receipts, of shipping freight of an equal quantity over the line of the appellant at the re-billing rate of three and one-half cents per cwt. *Thus, a merchant receiving a carload of oats over the Vicksburg, Shreveport and Pacific Railroad could within ninety days of that date ship over appellant's line a* **car load of corn** *or other grain produced without regard to the source from which it was procured.*" It thus appears that the arrangement in question would apply perfectly *to a carload of corn raised upon Mississippi soil near Vicksburg and destined for consumption in Meridian.* Therefore the Supreme Court of Mississippi naturally held that the re-billing rate, so-called, involved in this case was in fact a local rate; that the Railroad Commission had the power to make the order that the re-billing rate be made a local rate, in order to prevent discrimination; that the subterfuge employed "was simply a cloak assumed to conceal"

the discrimination. In New York *ex rel.* Penna. R. R. Co. *v.* Knight, 192 U. S. 21, this court said: "But when service is wholly within a State, it is presumably subject to state control. *The burden is on him who asserts that, though actually within, it is legally outside the State; and unless the interstate character is established, locality determines the question of jurisdiction.*" In Osborne *v.* Florida, 164 U. S. 654, this court said: "The particular construction to be given to this state statute is a question for the state court to deal with, and in such case as this we follow the construction given by the state court to the statute of its own. Leffingwell *v.* Warren, 2 Black, 599; New York *v.* Weaver, 100 U. S. 539; Noble *v.* Mitchell, 164 U. S. 367, and cases there cited. The Supreme Court of Florida has construed the 9th section of this Act and has held in express terms that it does not apply to or affect in any manner the business of this company, which is interstate in its character; that it applies to and affects only its business which is done within the State, or is, as is termed 'local' in its character; and it has held that, under that statute, so long as the express company confines its operations to express business that consists of interstate or foreign commerce, it is wholly exempt from the legislation in question."

Nothing is better settled than the power of a State to regulate traffic carried on within its limits, not strictly interstate. Postal Telegraph Cable Co. *v.* Charleston, 153 U. S. 692. A railroad corporation largely engaged in interstate commerce is amenable to state regulation

and taxation as to any of its service which is wholly performed within the State, and not as a part of interstate service. New York *ex rel.* Penna. R. R. Co. *v.* Knight, 192 U. S. 21; Pullman Co. *v.* Adams, 189 U. S. 420; Kehrer *v.* Stewart, 197 U. S. 67.

The Supreme Court of Mississippi therefore decreed that the business in question was really intrastate business, and that the order in question made by the Railroad Commission of that state related to a matter within its exclusive jurisdiction. It thus appears that the decree of the lower court was confined to a single subject-matter wholly within the control of the State of Mississippi and not subject to any of the clauses of the Federal constitution which the plaintiff in error has invoked.

II.

**On a writ of error nothing is removed for re-examination but questions of law arising upon the record.**

It is not necessary to cite authorities to maintain the proposition that upon a writ of error this court has no right to review the decision below, upon the ground that the finding was against the evidence or the weight of the evidence. Upon a writ of error, this court can not review a decision of a question of fact, even where, by the local practice of the State, the law and the facts are tried together by the judge without a jury. Dower *v.* Richards, 151 U. S. 658. In Eagan *v.* Hart, 165 U. S., 188, this court, after declaring that on error to a state court, this court can not re-examine the evidence, and when the facts are found below is concluded by such finding, said

"that on error to the Supreme Court of Louisiana the opinion of that court is to be treated as part of the record, and that it may be examined in order to ascertain the questions presented, and this court may for the purpose, not of deciding the facts, but by way of throwing light on the findings, look into the entire record." Suppose the benefits of that liberal rule were extended to the plaintiff in this case, what would be the result? The record shows that no "*findings of fact*" were ever made either by the Chancellor, who dismissed the bill for want of equity, or by the Supreme Court of Mississippi which simply affirmed the decree dismissing the bill. It is a well settled rule of pleading that when such a dismissal takes place, an "opinion or finding is not required." See Enc. of Pleading and Practice, vol. 6, pp. 996. It is not necessary or usual in the Chancery practice of Mississippi for a Chancellor to file any opinion at all under such circumstances, and for that reason the Chancellor in this case simply addressed a letter or communication to counsel which has in some way crept into the record, but is no proper part of it. See Tr. p. 94. While this court has nothing whatever to do either with the decree or the opinion of the Chancellor the erroneous and misleading statement in plaintiff's brief that the "Chancellor finds as a fact that three and one-half cents rate on grain imposed by the Mississippi Railroad Commission requires railway company to haul at a loss and Supreme Court of Mississippi affirms this finding," (p. 38), should be corrected. The record shows affirmatively that *the Chancellor made no findings of fact whatever.* He simply dismissed the bill for want of equity which action precluded

the possibility of a finding. In the course of the so-called opinion which was superfluous, the Chancellor referred to a certain statement made by a Mr. Harvey, but he did not undertake to say that such statement proved the fact in question. On the contrary the Chancellor says, "But when Mr. Harvey on whom the burden of proof is cast (that is to show a loss to the Company), is called upon to show that he says: 'Neither in our records, nor bookkeeping, nor in any other manner, has our company any accurate way of apportioning the cost of expense between the State and inter-state' * *. The burden of proof when their action is sought to be impeached, is cast upon the party assailing it, and cannot be overthrown by the statement that the local business is being run at an expense unless the showing is made." Tr. p. 97. So far from the Supreme Court of Mississippi supporting the contention "that three and one-half cents rate on grain, imposed by the Mississippi Railroad Commission, requires railway Company to haul at a loss," *it said expressly that it would not consider that subject at all*, because it was immaterial. Its exact language is this: "We decline to enter upon a discussion of either question; neither is necessarily involved in the decision of this case." Tr. p. 106. The practical result is that, even if the opinion of the State Supreme Court should be treated as a finding of fact, it contains absolutely no data of fact upon which plaintiff in error can base its arguments, which are entirely abstract. All of its assumptions of fact, as the bases of its defenses, are without support in the record.

## III.

**Even if the commerce in question was interstate the order of the Railroad Commission prohibiting a discrimmination within the State was not illegal.**

As the lower court has adjudged that the commerce in question was intrastate the burden is on the plaintiff to maintain the contention that it was interstate. "But when service is wholly within a State it is presumably subject to state control. The burden is on him who asserts that, though actually within, it is legally outside the State; and unless the interstate character is established, locality determines the question of jurisdiction." New York *ex. rel.* Penna. R. R. Co. *v.* Knight, 192 U. S. 21. The pretense set up by plaintiff in error that "As a matter of fact, the re-billing rate was not voluntarily adopted," is entirely without foundation as clearly appears from its brief, pp. 7–11. As to that pretense the Supreme Court of Mississippi has well said: "Again we do not recognize it as a possibility under any contingency that the Railroad Commission of Mississippi would, or need employ threat or menace to protect the rights of the public from the aggression or extortion of corporations. We rebuke the intimation as an unwarrantable aspersion of the Railroad Commission. A state tribunal charged with the duty of exercising 'a watchful and careful supervision over the tariffs of charges of every railroad,' and of revising 'the same from time to time as justice to the public and to the railroad may require,' is clothed by law with necessary power to achieve the purposes of its existence, without resorting to menace

or threat to extort from any corporation subject to its lawful supervision an unreasonable reduction of rates. Nor do we admit that the necessity can ever exist for appellant, or any other corporation, to submit to unjust or unauthorized regulations by the Railroad Commission of Mississippi, when the courts of the land stand ever open, able and willing to protect them from any oppressive action. If in fact it be true, that the so-called re-billing rate establishes an unreasonably low compensation for the transportation of grain and grain products, and the same was inaugurated by order of the commission, then the appellant had a complete and adequate remedy by contesting in a legal way the reasonableness of the rate, and the power of the Railroad Commission to enforce it." As plaintiff in error admits that it actually made the rate in question; that it has never by its own act attempted to annul it; that it has never applied to any tribunal to relieve it of it by contesting it in any legal manner, it is estopped even to complain of it. Plaintiff has also failed to overcome the burden which the law puts upon it to establish the fact that the commerce in question is not wholly intrastate. Even if it were otherwise, even if it were clear that the commerce in question was interstate, we confidently contend that the order in question which simply undertakes, *not to impose a burden, but to remove an unlawful discrimination,* is not illegal. Brannon, in his excellent treatise on "The Fourteenth Amendment," in the chapter in which he treats of "Rights and Privileges under the Fourteenth Amendment," says: "A railroad corporation must serve all alike. It can give

no preference as to serving in the line of its business. It cannot carry for one and refuse another. *It may be compelled to perform proper and equal service for all by mandamus, and it is not thus deprived of property without due process of law or denied equality before the law.* So must other corporations." Citing State *v.* Pacif. Co. 52 La. Ann. 28; Inter-Ocean Pub. Co. *v.* Asso. Press, 184 Ill. 438. In the case last cited the court said: "It has been uniformly held that a telegraph or telephone company is bound to treat all persons and corporations alike, and without discrimination in its business of receiving and transmitting messages. The business of such a company is public in its nature, and a public interest is impressed thereon to such an extent that no discrimination can be made against persons or corporations. (People *v.* Western Union Tel. Co. 166 Ill. 15.) The foregoing authorities entirely dispose of those assignments of "error in which plaintiff claims that the court below erred (1) in holding that the said order of said Railroad Commission was valid, contrary to the contention of said railway company that the same was repugnant to and in violation of clause 3 of sec. 8 of article 1 of the Constitution of the United States, in that the same constituted a burden upon and a regulation of interstate commerce;" and (2) in holding that said order was not in violation of the Fourteenth Amendment of the Constitution of the United States. The allusion to the Fifth Amendment of the Constitution was evidently made through inadvertence as it cannot possibly apply to any aspect of the case as it operates only on the national govern-

ment and not on the States. Spies *v.* Illinois 125 U. S. 166.

A state statute requiring railroad companies to post a printed copy of all rates (including rates subject only to congressional control) and providing penalties for charging higher rates was upheld in *Railroad* v. *Fuller*, 17 Wall 560, the court saying: "It (the statute) only required that the rates shall be fixed, made public *and honestly adhered to*. In this there is nothing unreasonable or onerous. The public welfare is promoted without wrong or injury to the company * * *. It is not in the sense of the constitution in any wise a regulation of commerce. It is a police regulation." See also, *Denver R. R. Co.* v. *Atchison Co.* 15 Fed. 650.

A state statute forbidding discrimination by a carrier in charges for transportation, is not a regulation of interstate commerce when applied to shipments received in the State to points beyond the State. *Providence Co.* v. *Providence*, 15 *R. I.* 303. The court says: "The defendants are only called on to do, under a penalty, precisely what the common law declares it to be their duty to do without the statute; viz., to treat all alike under similar circumstances—a mere police regulation." This opinion is fortified by very many citations. See also Shipper *v.* Pennsylvania R. R. Co. 47 Pa. St. 338.

While this court has made it plain that States can neither "regulate commerce," nor burden it, it has with equal emphasis asserted that they may exercise over it many acts of authority which fall short of either. It was held in the Western Union Telegraph Co. *v.* James,

162 U. S. 650, that a state statute imposing a penalty for lack of due diligence in delivering a telegram is not an unconstitutional interference with interstate commerce as applied to interstate messages, in the absence of legislation by Congress on the subject. In that case it was said that: The statute in question is of a nature that *is in aid of the performance of a duty of the company that would exist in the absence of any such statute*, and it is in nowise obstructive of its duty as a telegraph company." So in this case the order of the Mississippi Railroad Commission was simply in aid of a duty imposed upon the carrier by the general law to "serve all alike"—a duty of equal service which any such corporation may be forced to perform by mandamus without its being "deprived of property without due process of law or denied equality before the law."

The court below held that the commission, to prevent discrimination merely extended the benefit of the existing 3½ cent rate to all shippers, and that in doing so it acted within the power conferred by sec. 4,297 of the Mississippi Code. This view greatly narrows the scope of the question and entirely eliminates many of the questions much discussed by appellant. It eliminates, for instance, the question of the constitutionality of that part of sec. 4,290 which, it is argued, requires the commission in revising tariffs to take into consideration the entire business of the railroad. The commission was not being called on to fix in the first instance a tariff or to judge as to the reasonableness of one submitted to it under sec. 4,290. It finds that the

Company, whose tariff has been approved, and which is not complaining that any tariff rate is too low, have been for a long time, and is now, discriminating in favor of a class of the public, and under the guise of giving a "re-billing" rate of 3½ cents from Vicksburg to Meridian, allows it to be availed of *so as to become in all respects, an open rate*. In short, the jurisdiction of the commission to prevent unjust discrimination is distinct from the power to revise tariffs and pass on their reasonableness as an original proposition. The commission may not have the power to compel the company to put on an extra train, but if such train is being run, it can compel the company to carry all on it upon the same terms. It may not compel a company to put in holiday rates, but it can compel such rates when put in to be given to all alike.

The commission did not undertake to fix a general tariff on grain products. It did not prescribe a local rate graduated according to mileage. The order deals with only *one* commodity, from only *one* point, to only *one* point, and shipped in only *one* way; viz., car-load lots.

The opinion of the court below fully explains wherein the so-called re-billing rate is in fact an open rate in its operation and how the commission, by its order, merely pointed out to all the public the true nature of the transaction, and gave to it what the Company had already given to a favored part of the public.

This whole matter has twice been carefully considered by the Interstate Commerce Commission, and the practice, just such as is here adopted, denounced as a "fiction,"

and the rate called a re-billing rate, as a local rate in reality. See *Chicago, etc., R. R. Co.* v. *Chicago & A. R. R. Co.*, 3 I. C. C. Rep. 4; s. c. 2 Int. Com. Rep., 721; 7 Int. Com. Rep. 240; 9 Ib. 373. This last case is also authority for the proposition discussed hereafter that the fact that the freight is received in large quantities from a certain connecting carrier or shipper does not warrant giving a special rate. Here the A. & V. seeks to give special privileges to the V. S. & P. and its customers.

The giving a re-billing privilege for ninety days to only those who had patronized the V. S. & P. is a gross discrimination. Such discrimination is condemned in the severest language by the decisions. See *Hays* v. *Penn. R. R.* 12 Fed. Rep. 309, and cases cited in note.

The A. & V. can not give a better rate to the V. S. & P. grain than to that brought in by rival carriers. It is liable in damages to the shipper or carrier discriminated against. *Samuels* v. *L. & N. R. R. Co.*, 31 Fed., 57.

Discrimination is defined by Judge Brewer in Wright *v.* U. S., 167 U. S., on page 578, where he says that the purpose of all such acts is "to enforce equality between shippers, and prohibit any rebate or other device by which two shippers shipping over the same line, the same distance, *under the same circumstances of carriage* are compelled to pay different prices therefor."

This case also condemns the giving special rate to one because he has a warehouse, and a switch on a competing line and to meet that advantage. A railroad company can not discriminate in favor of a shipper who is able to

furnish a large amount of freight over another in same business, at least where both ship in carload lots.

*Louisville, etc., R. R.* v. *Wilson*, 18 L. R. A., 105, and many cases cited in notes.

It is true Vicksburg has the river and this is a legitimate advantage in getting rates from the North and West *to* Vicksburg. But the Mississippi river does not flow *from* Vicksburg to Meridian, or parallel to the A. & V., and its presence does not entitle the Vicksburg dealer, who has his grain *in* Vicksburg, to ship it *out* on better terms than a Meridian or other dealer. The A. & V. has no concern where the grain in Vicksburg came from. There must be one rate for all grain, and one rate for all persons.

Where a carrier charges one connecting carrier more than another, the fact that the higher rate is not unreasonable does not relieve the discrimination. *Samuels* v. *L. & N. R. R. Co.*, 31 Fed., 57.

## IV.

**The proof in the record does not uphold the contention that the order in question has had the effect of depriving plaintiff of its prosperity "without due process of law," or has deprived it of "the equal protection of the law."**

So far the argument has proceeded upon the assumption that the only data of fact before this court is that defined by the Supreme Court of Mississippi as above set forth. Now let it be assumed for the sake of the argument, that the data of fact before the court is as wide as plaintiff in error in its brief claims it to be. Even upon that basis

it cannot be demonstrated that plaintiff has by the order in question been forced to conduct any part of its business at loss.

The rate is *prima facie* reasonable under the Mississippi statute, and the fact that the company is now and has been for years carrying all the grain it handles in any manner from Vicksburg to Meridian at 3½ cents, shows conclusively that it is deemed by the company reasonable. Mr. Harvey does not now claim that the rate ought to be more than 5 cents per 100. That is the rate he testifies "was a proper rate." (Transcript, p. 49). The Company had once given a rate of 2½ cents from Vicksburg to Meridian on Texas grain although its share of the freight seems to have been more than that. (Transcript, p. 58.)

It must not be forgotten that this rate is *as to the A. & V. itself* a through rate, *i. e.*, it is for a haul *over its entire line. It goes from terminal to terminal.* The car is put into a through train at Vicksburg and runs without change or switching over the entire line to the other terminal. There is, therefore, a minimum of expense, and the cars are left where most needed. No additional train force is needed because of a through car, and Mr. Harvey himself says that they "haul few, if any, cars out of Meridian empty." It is common knowledge that grain in carloads carries almost the lowest of rates. This fact is recognized in more than one opinion of this court and uniformly by the Interstate Commerce Commission. It is loaded by the shipper and unloaded by the consignee.

It is uniformly held that the commission, being presumably composed of business men, conversant with local

conditions, can better judge as to the reasonableness of rates than the courts. See *Interstate Com. Com.* v. *Louisville R. R. Co.*, 73 Fed., 409. "The state commission is peculiarly fitted to pass on the facts;" *Chicago, etc.* v. *Tompkins*, 176, U. S. 172.

The burden being on the Company to show the rate unreasonable, it must clearly show that this particular rate is, under the existing circumstances so unreasonable as to deprive it of its property without due process of law. The company seeks to do this by showing its interstate earnings and intrastate earnings, and then making a computation as to the costs of moving freight per ton and per mile. It claims that the commission could only look to the earnings from intrastate business. The opinion of the Chancellor clearly shows that while the commission can not take interstate earnings as a *basis* of fixing local rates, it is impossible not to *consider* the total business of the road for some purposes. This is made clear, and the construction sought to be put on *Smythe* v. *Ames*, is shown to be erroneous. Minneapolis &c Co. *v.* Minnesota 186 U. S. 257. But if we grant the rule as claimed, complainants fail, because it is equally true that the Company, to show the unreasonableness, must show the *cost* of doing its local business. This it fails to do. Mr. Harvey and Mr Steele say that they have no data for showing it. See Atlantic Co. *v.* U. S., 76 Fed. 190. State *v.* Seaboard Air Line (Fla.) 37 So. Rep. 314 clearly shows the distinction between considering interstate rates as a basis of fixing domestic rates and for determining the proportion of the

value of the property assignable to domestic business and for other purposes.

When a commission and the officers of a railroad company differ as to the unreasonableness of a rate and there is room for intelligent difference of opinion, the courts will not interfere but will leave it to the test of experience. 23 Am. & Eng. Enc. L. 657; citing 29 Fla. 617; 25 Fla. 310.

The presumption of reasonableness is not overcome except by proof of expenses and receipts during an adequate period. 76 Fed. 186.

Evidence that the rates are lower than that of other points or on other roads is not competent. Conditions may be different. Interstate Com. *v.* Nashville etc., R. R. Co. 120 Fed. 934.

The case must be a clear one to warrant interfering with rate fixed by the commission. *Chicago* v. *Tompkins. supra.*

This case also holds that the net earnings must be shown before the courts can judge of reasonableness. Now appellant contends that the net local earnings, *i. e.*, the receipts from local business less the cost of local business must be the test, and cites *Smythe* v. *Ames*, 169 U. S., 466. This argument is self-destructive to appellant, for Mr. Harvey and Mr. Steele both say that they can not ascertain the cost of the intrastate business. Without this essential information how can it be said that the burden of proof has been met?

If the commission had been fixing a rate in the first instance, and imposing it on an unwilling road, there

would be room for the defense, if established, that the carrying of the grain would be at a positive loss. But on that point we say, first, that this is not the original fixing of a tariff, but the extension of an existing rate voluntarily put in force, and in general use by a class of dealers, and under which all its grain shipped from Vicksburg to Meridian is being carried to all shippers alike; and, secondly, the reasoning and computation to show that there is a loss is fallacious.

Even in the original fixing of rates by a commission, the court will not interfere if the rate fixed gives any compensation at all. *Chicago, etc.* v. *Day*, I. L. R. A., 746.

The question as to reasonableness necessarily involves inquiry as to the present value of the railroad and its equipment. All the authorities hold this to be essential. We pass by, as unworthy of note, the contention of appellant that the total cost exceeds $10,000,000.00. This is made up by adding to the original stock on bonds (whether watered or fictitious is not shown) all the expenditures for way, equipment, interest, etc., during perhaps fifty years. The total stock is $1,050,000.00 and all the bonds $2,190,100.00 *This stock and these bonds* are worth *par* and are not quoted for sale. Transcript p. 14. On this basis, which we submit is fictitious and excessive, the company earns enough to pay the interest on bonds, good dividends on stock, and a large surplus every year over all kinds of expenses and improvements. Transcript p. 90. On the above basis the net earnings for the year ending June 30, 1903, *over and above operating expenses and fixed charges* were $161,313.33, or, in other words,

16% per annum earnings. P. 90. Yet this company rendered its entire property in for taxation at $8,500.00 per mile, or in the aggregate $1,488,421.00. Transcript p. 52. Such returns for taxation are competent and of great value. *L. & N. R. R.* v. *Brown* 123 Fed. 946. On such a basis its net earnings would approximate 30%. The complainant does not come into equity with clean hands under such a showing.

The burden to show unreasonableness is not met where it appears that dividends on stock were computed as fixed charges. 83 N. W. Rep. (Minn.) 60; *Chicago* v. *Day*, *supra*.

In this case the company says that it can not even estimate the present value of the property, and this, although a proper method of valuing railroad property has been pointed out. See Report of Interstate Com. Commission, 1903, p. 30.

Where it was shown that the company under a rate earned only 1½% on original cost, the order fixing it was held not unreasonable. 125 Fed. 680.

The computation by Mr. Harvey (T. p. 28.) to show that grain is carried at a loss, is obviously fallacious. His theory is bad and his arithmetic faulty. He gets his figures from the tabulation, T. p. 43. His item, $2.176 as "expense for freight per freight-train mile" is obtained by dividing the total freight expenses, $598,713.30 by the total miles traversed by the freight trains (or strictly speaking, freight locomotives), viz.: 275,100 miles. But the total freight mileage is not 275,100 miles, but 436,436 miles (T. p. 43) for since the expense of switching applicable

to local freights goes in to help make up the total freight expenses, the switching mileage must be computed in the total freight mileage. Thus we have $598,713.30 divided by 436,436, which gives $1.37 instead of $2,176 as expense per freight-train mile. This multiplied by 140 mileage from Vicksburg to Meridian gives $191.80 as cost of average freight train from Vicksburg to Meridian, instead of $304.64, whereas the average receipt is admitted to be $261.80. Another fallacy in Mr. Harvey's calculation is that the *expense* is computed on a basis of *all kinds* of freight and the *receipts* only on the *grain rate*. The truth is, the haul of through cars of grain costs very much less than the average freight, because it is always in carloads, is loaded by the shipper, unloaded by the consignee, goes from terminal to terminal, without switching and in 10 hours, whereas purely local trains require 15 hours. T. p. 61.

Their arithmetic is no better on the subject of expense per *ton* per mile. The total tonnage for 1902–3 was 646,485 tons. They say that the total expense per ton *per mile* was 9.1 mills. T. p. 59. These figures were gotten by dividing the total freight expense, $598,713.00 by the said total tonnage. This gives about 93 cents representing the cost of hauling each ton. It will be seen that Mr. Harvey admits receiving $1.184 per ton for grain shipments to Meridian. It is regardless of mileage. Now if 93 cents is the average cost of *moving each ton*, and the local rates, then being collected, were much higher than through or re-billing rates, it follows that the local rates were above 93 cents and re-billing rates *were lower*. Hence 70 cents per ton

for a through shipment from terminal to terminal, without delays, switching charges, loading or unloading or other expenses, must be reasonable. Certain it is that the company extends this so-called re-billing rate until it operates as a local rate and takes all the business it can get at that figure. The suggestion that the 3½ cent rate is from the river or wharf and not from the Company's station has no foundation. Again Mr. Harvey states that an average freight train from Vicksburg to Meridian costs $304.64, and that if the rate on all kinds of freight was 3½ cents the company would lose $42.84 on each train, receiving only $261.80 per train. This would entail a loss over actual earnings of only about 16%. (T. p. 28.) Yet it is shown the company after all expenses and maintenance and fixed charges earns 16% on its common stock. Surely if grain which carries the lowest of rates has a rate now so near the actual average of all rates it will not be declared unreasonable.

The argument that the Company can afford the present rate as a re-billing rate because it enables them to get freight cars, is disproved by appellant's own testimony. Even if true, this would not justify discrimination as against private shippers. It might be a good excuse for favoring the V. S. & P. in routing of freight and terminal facilities and interchange of cars, but it cannot justify giving "A" the rate of 3½ cents on grain in his warehouse, or wherever it may be, just because he once brought in a like amount by a certain connecting carrier, and denying to "B" who may have some of the same grain in the same warehouse, the same rate. But Mr. Jones' testimony

that empties were needed and thus procured for out-bound shipments is not borne out by the facts. The A. & V. has more cars per mileage than the average of railroad companies. It is shown that almost no cars leave Meridian going west empty. If they go west full they can come back full. It might well be argued that it is an advantage to appellant to get a shipment to Vicksburg via V. S. & P. if the car can at once be used for the continued shipment over it to Meridian. But the cars are not kept 90 days. The same cars are not used for the extended shipment. Finally we submit that the commission cannot sanction discrimination in favor of a town or shipper because the company has an insufficient number of cars. A lack of sufficient cars or a glut in business may justify delay in shipments, but not discrimination as between shippers.

We have not discussed the point of Meridian being a basing or competitive point and the alleged or hinted-at discrimination against other towns. This is not a freight classification. It is the curing of a discrimination by doing what the Interstate Commerce Commission says in its report (1903 p. 12) it has to frequently do, viz.: reduce tariffs to the basis of rates found to be already granted. No other town is complaining. The A & V. Co. itself recognizes and treats Meridian as a competitive point, and is not complaining on that ground. It has been twice held by the Interstate Commerce Commission that Meridian is properly a competitive point. That question might arise on a general classification, but not in this case.

In conclusion, the question presented is exceedingly important to the public. It involves a comparatively

small amount to the plaintiff in error. If the rate had been put in operation, it would have diminished the Company's revenue only $1495.00 in 1903. The vital question is whether our commission is to be shorn of its power to compel a rate adopted and in force as to *part* of the public to be extended to the *whole* public. The welfare of the community to which shipments are sent is to be considered in fixing a rate. 162 U. S. 194. The main purpose of all acts of legislatures creating commissions is to force equality of rights for all shippers. 168 U. S. 144; 167 Ib. 512; 7 Cyc. 485.

We do not seek, nor did the commission seek to deprive Vicksburg of its advantage as a competing point. We say to Vicksburg and Vicksburg dealers, "You have your river and you are welcome to the lower rates the river, or the roads because of the river, give you *into* Vicksburg, but not to a lower or privileged rate *out of* Vicksburg on shipments from Vicksburg over one of the roads leading into Meridian, and with which neither the river nor the V. S. & P. competes."

We respectfully submit that the judgment of the Supreme Court of Mississippi should be affirmed.

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